5

MARCH 5. 1771.

ANSWERS

FOR

DAVID GRAY, Shoemaker in *Preſtonpans*;

TO THE

PETITION of ROBERT REID, Shoemaker in *Kilmarnock*.

KILMARNOCK was, by a charter under the great ſeal, *anno* 1591, erected into a burgh of barony, with as ample privileges as any burgh of barony in the kingdom, in favour of the family of *Boyd*, Lords of *Kilmarnock*. Which charter was ſoon afterwards ratified by an act of parliament; and, for about an hundred years, the burgh was governed by a baron-baillie, nominated by that noble family.

This town having greatly increaſed, both in point of extent, and number of inhabitants, it was juſtly conſidered to have become too reſpectable to continue in that inferior and ſubordinate ſituation, which was very ſuitable to its original ſtate; and therefore, about the end of laſt century, a ſcheme was formed by the then Earl of *Kilmarnock*, of having it erected into a *Royal Burgh*.

With this view, a contract was entered into between *William* Earl of *Kilmarnock*, and *William* Lord *Boyd*, his ſon, on the one part, and *Robert Rodger*, *Matthew Hopkins*, and *Hugh Wallace*, merchants in *Kilmarnock*, for themſelves, and in name and behalf of the town and inhabitants of *Kilmarnock*, on the other part; whereby, in conſideration of a certain ſum of money paid to the ſaid Earl, and the community being further bound for the expence,

pence, that ſhould be laid out in erecting the town into a *burgh royal*, the Earl, and Lord *Boyd* his ſon, conſented that *Kilmarnock* ſhould be erected into a *burgh royal*, with a reſervation to the family of *Kilmarnock*, of their privilege of chuſing the magiſtrates thereof, on leets to be offered to them; and, at the ſame time, the Earl and his ſon ſold and diſponed to the town, certain lands, with the tolls and cuſtoms of the town, as a common good to the burgh, in order to ſupport the police thereof.

The ambitious ſcheme of having *Kilmarnock* made a royal burgh, did not take place. It was, indeed, a project intended by the family of *Kilmarnock*, for their own aggrandiſement, and the more ſenſible part of the community did not approve of it. But it appears, that the diſpoſition above-recited had ſo far an effect upon the burgh, that the Earl, in virtue of the foreſaid charter and act of parliament, erected the town into a corporation, conſtituting a magiſtracy and council therein, who continued in ſucceſſion from that period to the 5th of *November* 1700.

Nov. 5. 1700. Accordingly, on the 5th of *November* 1700, the Earl of *Kilmarnock*, with conſent of his curators, upon the narrative of the diſpoſition 1690, and upon payment made to the Earl, of the ſum of 3650 *l. Scots*, ratifies ſaid diſpoſition, and makes certain other grants, which, ſo far as neceſſary here to be recited, are in the following terms:

" *With power to the ſaid baillies, to hold and affix courts within* " *the bounds of the ſaid town; and to decide, determine, and cog-* " *noſce in all actions and cauſes, both civil and criminal; and to pro-* " *nounce decreets, to put the ſame to due and lawful execution, to re-* " *ceive fines, unlaws, and amerciaments, to apply the ſame to the uſe* " *and profit of the ſaid town and community thereof.*"

" *And generally, with power to the ſaid baillies, treaſurer, and* " *council of the ſaid town, preſent and to come, to do and act in eve-* " *ry affair relative to the ſaid town, ſicklike, and as freely in all re-* " *ſpects, as any other baillies, treaſurer, and counſellors, of any other* " *free burgh within this kingdom are known to do, have done here-* " *tofore, or, by the laws of this kingdom, may do at any time coming.*"

When the Earl of *Kilmarnock* came of age, his Lordſhip, on May 31. 1705. the 31ſt of *May* 1705, ratified the above diſpoſitions; on which occaſion, alſo, the town paid a valuable conſideration. The corporation

poration, as thus eſtabliſhed, conſiſted of 2 baillies, 19 counſellors, a treaſurer, town clerk, procurator-fiſcal, and town-officer; ſo that the community had now conveyed to them the full juriſdiction veſted in the family of *Kilmarnock* by the charter 1591, and act of parliament, both above noticed.

From the above hiſtory of the town of *Kilmarnock*, it will readily occur to your Lordſhips, that all care was taken, and no expence ſpared to ſecure to it *the independent juriſdiction of a burgh of barony*.

It ſeems, however, that a doubt has been lately ſtirred, Whether the juriſdiction of the baillies of *Kilmarnock* does not fall under the limitation of forty ſhillings in civil cauſes, in terms of the juriſdiction act.

This doubt has been in a queſtion between two ſhoemakers, the one a ſhoemaker in *Kilmarnock*, the other in *Preſtonpans*: The latter of theſe, the reſpondent, brought his action againſt the former, the petitioner, before the baillies of *Kilmarnock*, for payment of 5 *l. Sterling*, with intereſt, he having lent that ſum to the petitioner about twelve years ago. The reſpondent obtained decree, which the petitioner thought proper to ſuſpend; and the cauſe having come before the Lord *Auchinleck* Ordinary, the petitioner, by way of a preliminary point, maintained, that the juriſdiction of the baillies of *Kilmarnock* was reſtricted, as above ſet forth; ſo that an opportunity has been given, in this trivial diſpute, to have a point of very important conſequence to the burgh of *Kilmarnock*, ſolemnly determined by a decree of your Lordſhips.

The Lord Ordinary was pleaſed, on the 13th of *February* 1771, to give judgment in the following words: "Finds the corporation or community of the burgh of barony of *Kilmarnock*, and the juriſdiction belonging to the magiſtrates thereof, is independent of the baron, and therefore repels the reaſons of ſuſpenſion." Feb. 13. 1771.

His Lordſhip's judgment having been ſubmitted to the review of your Lordſhips, in a reclaiming petition, and the ſame having been ordained to be anſwered, what follows is humbly offered on the part of the reſpondent.

The learned gentleman who draws the petition, has argued his cauſe very ingeniouſly; but, with humble deference, the plea that he has been obliged to maintain, proceeds upon grounds, which, upon examination, will appear not to be tenible.

In

It is a miſtake to ſay, that this is the firſt inſtance where the baillies of *Kilmarnock* have judged in a cauſe above 40 ſhillings: For the truth is, that they have judged in ſeveral ſuch cauſes; but this is the firſt of them that has been ſuſpended. They have alſo, both before and ſince the juriſdiction act, exerciſed their juriſdiction in criminal cauſes, and have often fined to the extent of 10 *l. Sterling* and upwards, as the crime deſerved.

And indeed, the argument againſt the juriſdiction of the magiſtrates of *Kilmarnock*, is, with great ſubmiſſion, founded altogether upon an erroneous interpretation of the juriſdiction act.

As there were formerly in *Scotland*, a number of heritable juriſdictions, and theſe were found to be attended with many bad conſequences, being altogether inconſiſtent with the true ſpirit of the *Britiſh* conſtitution, an act for aboliſhing them was one of the wiſeſt meaſures of our legiſlature. That ſalutary act was framed, in order to take away thoſe little juriſdictions, thoſe *imperia in imperio*, where the juriſdiction or adminiſtration of juſtice was in the power of an Over-Lord, whoſe tyranny proved very fatal to the people ſubjected to it.

But the act does expreſly provide, " That the ſame ſhall not " take away, or prejudice any *juriſdiction or authority, veſted in,* " *or competent to the corporation or community of any burgh of rega-* " *lity or barony in* Scotland, *or to the magiſtrates thereof, which is* " *independent of the Lords of regality or barony reſpectively.*"

Upon the true meaning and import of this exception in the juriſdiction-act, is the preſent queſtion to be judged; which meaning is, in the reſpondent's humble apprehenſion, abundantly clear, from the natural conſtruction of the words, eſpecially when we keep in view the purpoſe and intendment for which the ſtatute was framed, *viz.* to aboliſh the heritable juriſdiction of *Over-Lords*, not to aboliſh the juriſdiction of burghs; the former being pernicious, the latter moſt uſeful and convenient.

The meaning of the clauſe of exception in the act, depends on the application of the relative word, *which*; " Which is indepen- " dent of the Lords of regality or barony reſpectively." Now it is, with ſubmiſſion, clear, that *which* does there apply to *juriſdiction*, *independent* of the Lords of regality or barony, and not to the creation or election of the magiſtracy, to whom the juriſdiction was by this ſtatute reſerved.

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There is a very wide difference between a ſuperior's having a right to interfere in the election of the magiſtrates of a burgh of barony, and thoſe magiſtrates being dependent on him in the exerciſe of their juriſdiction: It was the laſt dependence only which the legiſlature could mean to aboliſh.

If the meaning of the ſtatute were ſuch as the petitioner has contended, it would go a great length to aboliſh the juriſdiction of all burghs of barony in the kingdom. It is believed there is hardly any caſe where the election of the magiſtracy of thoſe burghs is not in ſome ſhape dependent on the ſuperior; and conſequently, according to the petitioner's interpretation, the clauſe in the ſtatute above mentioned would have been a very uſeleſs reſervation.

The nomination of magiſtrates, and the powers and juriſdiction of magiſtrates, when once nominated, are by no means to be conſidered as ſimilar, or of equal importance. It is true, the Earl of *Glencairn*, as coming in place of the Earl of *Kilmarnock*, the ancient ſuperior, has reſerved to him an honorary right of nominating the baillies of this burgh out of a leet preſented to him by the council, and has alſo been found by your Lordſhips to have a right of nominating the clerk to the burgh. The petitioner is, however, miſtaken, when he alledges, that the reſervation to the council, of electing the bailies for the year, in caſe the Earl neglects to make his election, is nugatory, and of no effect, becauſe the Earl does never neglect ſo to do: For the fact is, that various inſtances have occurred, both in the time of the Earls of *Kilmarnock* and *Glencairn*, where, upon the Earl's neglecting to make uſe of his honorary privilege, the council of *Kilmarnock* have, in conſequence of the right devolved upon them by the conſtitution of the burgh, elected the baillies.

But, allowing the Earl to be ever ſo conſtant in the exerciſe of his reſerved right, your Lordſhips, it is humbly hoped, will ſee clearly, that his right is only an honorary diſtinction, a mere ceremony and form, and does in no degree impinge upon the *independent juriſdiction* veſted in the community of *Kilmarnock*, by their charter about the beginning of this century, and ever ſince competent to, and exerciſed by the magiſtrates of that burgh, who conſidered, it is humbly apprehended, with great juſtice, that their juriſdiction was expreſly reſerved to them, in the exception contained in the juriſdiction act.

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The Earl of *Glencairn*, the now ſuperior, has his own baron baillie, who gives decreets for rents, and determines in ſmall cauſes below forty ſhillings. But the *Baillies of Kilmarnock* make quite a different court; and the eldeſt of them is, *ex officio*, one of his Majeſty's juſtices of peace for the county of *Ayr*.

The reſpondent mentioned the royal borough of *Wick* in *Caithneſs*, of which *Sinclair* of *Ulbſter* is heritable *Provoſt*, only to ſhew, that ſuch *præmia*, ſuch pieces of diſtinction, though very honourable to families in whom they are veſted, are to be conſidered as by no means creating a dependency upon them of the juriſdiction of boroughs with which they are connected.

The town of *Kilmarnock* is well known to your Lordſhips, to be one of the moſt flouriſhing communities in *Scotland*. By ingenuity and induſtry in manufactures, the inhabitants are comfortable and happy themſelves, and a bleſſing to all the country round: Nor can they regret their not having obtained the dignity of a royal borough, when they make a compariſon of their ſituation with that of thoſe boroughs who boaſt their having a voice in the election of a member of parliament. As political matters are now carried on, thoſe who wiſh well to the good morals and real proſperity of their town, will congratulate themſelves in being ſecure from temptations to idleneſs and vice. All that the reſpondent maintains, as competent to the town of *Kilmarnock*, is the juriſdiction *of a free burgh of barony*, in terms of their charters; and he is humbly confident, that your Lordſhips will be unanimous in affirming the Lord Ordinary's interlocutor, and thereby giving the ſanction of our ſupreme court to that juriſdiction.

In reſpect whereof, &c.

JAMES BOSWELL.